Tan Kim Hor & Ors v Tan Heng Chew & Ors

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING UP NO D3(D2)–28–507 OF 2001
ZULKEFLI J
6 JANUARY 2006

Companies and Corporations — Winding up — Just and equitable rule — Striking out petition — Petitioners claimed to be in a '50:50 or equal quasi-partnership' — Petitioner in another civil suit filed subsequent to the petition, has on oath claimed that the petitioners own 55.4% of the shares in the company and have sought rectification of the shares register — Multiple claims and take multiple stands on oath on the very same issue of their shareholding — Whether the petition has not been made in good faith with genuine belief in its merits — Whether there is res judicata and/or issue estoppel arising in relation to this present application by the respondents

Companies and Corporations — Winding up — Stay of proceedings — Striking out petition — Difference in principles for stay of proceedings from the principles of striking out — Whether the petition can be sustained and/or is an abuse of process — Whether the court is at liberty to consider the facts and issues raised, and come to a decision independent of the decision on stay

This was the respondents' application to strike out a winding up petition ('the petition'). The petition presented by the petitioners was based on the 'just and equitable' ground under the provision of s 218(1)(i) of the Companies Act 1965. It was clear from the petition that even though the petitioners were registered as 44.6% shareholding of the ninth respondent company ('the company'), the petitioners claimed to be in a '50:50 or equal quasi-partnership' based on a claim that the petitioners beneficially hold 50% of the shares in the company. This application by the respondents was made on the sole issue that even though in the petition the petitioners claimed on oath to be in a '50:50 or equal quasi-partnership' by virtue of the petitioners allegedly beneficially owning 50% of the shares in the company, yet in another civil suit ('the said Civil Suit') filed subsequent to the petition, the first petitioner had on oath claimed that the petitioners own 55.4% of the shares in the company and had sought rectification of the shares register accordingly. It was the contention of the respondents that the petitioners' sworn claim to be in a '50:50 or equal quasi-partnership' in this petition based on a 50% original shareholding could not be sustained in view of the petitioners' subsequent claim of owning 55.4% of the shares in the company and that the court had the power to strike out the petition as an abuse of process under its inherent jurisdiction.

Held, allowing the application:

(1) The fact that subsequent to the filing of the petition, the petitioners through the said Civil Suit had made a claim that from the initial incorporation of the

company, they had actually owned 55.4% of the shares in the company that was, an additional 10.8% more in the share holding, it would be untenable for the petitioners to proceed to pursue this petition on the basis of a claim to an additional 5.4% of the shareholding of the company, and consequently to allege that the relationship between the petitioners and respondents was a '50:50 or equal quasi-partnership' based on the 50% shareholding claim. The petitioners' claim as sworn herein to own 50% (or 44.6%) of the shares was entirely inconsistent, incompatible and irreconcilable with the alleged claim to 55.4% of the shares as sworn by the first petitioner in the said Civil Suit. The petitioners' claim in the petition had no foundation in fact, and had not been made in good faith with genuine belief in its merits. The petition filed therefore was an abuse of process and should be struck out (see para 4).

(2) The petitioners had not confirmed whether their purported claim to a higher shareholding was for an additional 5.4% as alleged in the petition or 10.8% as alleged in the said Civil Suit claim. However, based on the first petitioner's own statement on oath in the said Civil Suit, it appeared that the petitioners claim an additional 10.8%, not merely 5.4%. The shareholding of the petitioners was a material fact and formed the sub stratum of the petitioners' 'entitlement' to present this petition. With the first petitioner's admission, the petitioners were clearly not in a position to sustain this petition since based on their own claim in the said Civil Suit to own 55.4%, the petitioners would in fact be in the majority. In fact, if the petitioners really own 55.4% of the shares of the company, the petitioners would be 'in control' and there would be no basis for the presentation of a winding up petition since they could simply apply to rectify the register as they have intended to do so in the said Civil Suit and thereafter convene an EGM to correct any alleged wrongs if they win in the said Civil Suit (see para 6).

(3) The petitioners could not be allowed to file multiple claims and take multiple stands on oath on the very same issue of their shareholding just to suit the particular purpose of the suit. The court whose equitable jurisdiction is being invoked would not stand by and allow the petitioners to abuse its process in such a manner by swearing the 'truth' of three irreconcilable versions. The petitioners in seeking to invoke the 'just and equitable' principle to wind up the company had clearly not come to court with clean hands (see para 8).

(4) There was no res judicata and/or estoppel issue arising in relation to this present application by the respondents. The Court of Appeal's decision of *Tan Kim Hor & Ors v Tan Heng Chew & Ors* [2003] 1 MLJ 492 in relation to the first striking out application which allowed the appeal by the petitioners did not consider the inconsistent and contradictory averments made by the first petitioner in the said Civil Suit, of owning 55.4% of the shares in the ninth respondent. The Court of Appeal's decision then was focused on the issue of whether it was a plain and obvious case for striking out or whether the petition was an abuse of process. The said Court of Appeal's decision was therefore premised on different issue and consideration and was not binding herein. The Federal Court then did not deal with this new issue when determining the

respondent's application whether or not leave ought to be granted against the decision of the Court of Appeal in relation to the first application to strike out (see para 9).

(5) The principles for stay of proceedings are different from the principles of striking out. Even though the court has decided that this petition ought not be stayed as the said Civil Suit will not determine the issue of breakdown etc, as claimed in this petition, the court has yet to consider and may still consider whether the petition is still sustainable and/or whether it is an abuse of process in the light of the contradictory averment of percentage of shareholding held on trust which is raised also in this petition. Therefore in so far as to whether the petition can be sustained and/or is an abuse of process, the court is at liberty to consider the facts and issues raised, and come to a decision independent of the decision on stay (see para 10).

[Bahasa Malaysia summary

Ini adalah permohonan responden untuk membatalkan petisyen penggulungan ('petisyen tersebut'). Petisyen tersebut telah dikemukakan oleh pempetisyen berdasarkan alasan 'just and equitable' di bawah peruntukan s 218(1)(i) Akta Syarikat 1965. Adalah jelas daripada petisyen tersebut bahawa meskipun pempetisyen didaftarkan sebagai memegang 44.6% syer dalam syarikat responden kesembilan ('syarikat tersebut'), pempetisyen mendakwa berada dalam '50:50 or equal quasi-partnership' berdasarkan satu tuntutan bahawa pempetisyen mendapat faedah untuk memegang 50% daripada syer dalam syarikat tersebut. Permohonan ini oleh responden dibuat berdasarkan semata-mata atas persoalan bahawa meskipun dalam petisyen pempetisyen menuntut atas akuan sumpah adalah '50:50 or equal quasi-partnership' menurut pengataan pempetisyen memiliki 50% daripada syer dalam syarikat tersebut, satu guaman sivil lain ('Guaman Sivil tersebut') telah difailkan berikutan petisyen tersebut, pempetisyen pertama telah atas akuan sumpah mendakwa bahawa pempetisyen memiliki 55.4% daripada syer dalam syarikat tersebut dan telah memohon pembetulan pada buku daftar syer dengan sewajarnya. Adalah hujah responden bahawa tuntutan bersumpah pempetisyen yang berada '50:50 or equal quasi-partnership' dalam petisyen ini berdasarkan pegangan syer 50% tidak boleh dikekalkan berdasarkan tuntutan lain pempetisyen memiliki 55.4% syer dalam syarikat tersebut dan bahawa mahkamah mempunyai kuasa untuk membatalkan petisyen sebagai satu penyalahgunaan proses di bawah bidang kuasa sedia adanya.]

Diputuskan, membenarkan permohonan tersebut:

(1) Hakikat bahawa berikutan pemfailan petisyen tersebut, pempetisyen melalui Guaman Sivil tersebut telah membuat tuntutan bahawa berdasarkan mulanya penubuhan syarikat, mereka sebenarnya memiliki 55.4% syer dalam syarikat tersebut iaitu, tambahan 10.8% dalam pegangan syer, ia tidak boleh dipertahankan untuk pempetisyen meneruskan petisyen ini berdasarkan tuntutan berhubung tambahan 5.4% dalam pegangan syer syarikat tersebut, dan seterusnya untuk mengatakan bahawa hubungan antara pempetisyen dan

responden adalah '50:50 or equal quasi-partnership' berdasarkan tuntutan pegangan syer 50%. Tuntutan pempetisyen seperti yang disumpah ini memiliki 50% (atau 44.6%) daripada syer tersebut langsung tidak konsisten, tidak bersesuaian dan bertentangan dengan tuntutan yang dikatakan berhubung 55.4% syer seperti yang disumpah oleh pempetisyen pertama dalam Guaman Sivil tersebut. Tuntutan Pempetisyen dalam petisyen tiada asas, dan tidak dibuat dengan niat baik dengan kepercayaan tulen dalam meritnya. Petisyen yang difailkan oleh itu merupakan satu penyalahgunaan proses dan patut dibatalkan (lihat perenggan 4).

(2) Pempetisyen tidak mengesahkan sama ada tuntutan mereka berhubung pegang syer yang lebih tinggi adalah untuk tambahan 5.4% sebagaimana yang dikatakan dalam petisyen tersebut atau 10.8% sebagaimana yang dikatakan dalam tuntutan Guaman Sivil tersebut. Namun begitu, berdasarkan penyataan bersumpah pempetisyen pertama dalam Guaman Sivil tersebut, ia kelihatan bahawa pempetisyen menuntut tambahan 10.8%, dan bukan hanya 5.4%. Pegangan syer pempetisyen adalah fakta material dan membentuk sub stratum 'entitlement' pempetisyen untuk mengemukakan petisyen ini. Dengan pengakuan pempetisyen pertama, pempetisyen dengan jelas bukan dalam kedudukan untuk mengekalkan petisyen ini memandangkan berdasarkan tuntutan mereka sendiri dalam Guaman Sivil tersebut yang memiliki 55.4%, pempetisyen sememangnya adalah majoritinya. Bahkan, jika pempetisyen memang memiliki 55.4% syer dalam syarikat tersebut, pempetisyen akan berada 'in control' dan tiada asas untuk mengemukakan petisyen penggulungan kerana mereka dengan mudah boleh memohon pembetulan atas buku daftar sebagaimana yang mereka ingin lakukan dalam Guaman Sivil tersebut dan seterusnya mengadakan satu EGM untuk membetulkan apa-apa kesilapan yang dikatakan jika mereka menang dalam Guaman Sivil tersebut (lihat perenggan 6).

(3) Pempetisyen tidak boleh dibenarkan memfailkan tuntutan berganda dan mengambil pendirian yang sama atas sumpah berkaitan isu sama berhubung pegangan syer mereka hanya untuk disesuaikan bagi tujuan tertentu guaman. Mahkamah yang mempunyai bidang kuasa ekuiti tidak boleh berdiam diri dan membenarkan pempetisyen menyalahgunakan prosesnya dalam cara sedemikian dengan mengangkat sumpah terhadap 'truth' tiga versi yang bertentangan. Pempetisyen yang ingin menggunakan prinsip 'just and equitable' untuk menggulungkan syarikat tersebut dengan jelas tidak datang ke mahkamah dengan tangan yang bersih (lihat perenggan 8).

(4) Tiada isu res judicata dan/atau estopel yang timbul berkaitan permohonan semasa oleh responden. Keputusan Mahkamah Rayuan dalam *Tan Kim Hor & Ors v Tan Heng Chew & Ors* [2003] 1 MLJ 492 berkaitan pembatalan kali pertama permohonan yang membenarkan rayuan oleh pempetisyen tidak mengambilkira pengataan tidak konsisten dan bertentangan yang dibuat oelh pemeptisyen pertama dalam Guaman Sivil tersebut, iaitu memiliki 55.4% syer dalam responden kesembilan. Keputusan Mahkamah Rayuan kemudian memberi tumpuan kepada isu sama ada ia adalah satu kes yang biasa dan nyata untuk pembatalan atau sama ada petisyen tersebut adalah satu penyalahgunaan proses. Keputusan Mahkamah Rayuan itu berdasarkan isu dan pertimbangan

berbeza dan tidak mengikat mereka. Mahkamah Persekutuan kemudiannya tidak membincangkan isu baru ini apabila menentukan permohonan responden sama ada atau tidak kebenaran patut diberikan terhadap keputusan Mahkamah Rayuan berkaitan permohonan pertzma untuk membatalkannya (lihat perenggan 9).

(5) Prinsip untuk penggantungan prosiding berbeza daripada prinsip pembatalan. Meskipun mahkamah telah memutuskan bahawa petisyen ini tidak patut digantung kerana Guaman Sivil tersebut tidak akan menentukan isu huraian dll, seperti yang dituntut dalam petisyen ini, mahkamah masih belum mengambilkira dan masih mengambilkira sama ada petisyen tersebut masih boleh dikekalkan dan/atau sama ada ia adalah satu penyalahgunaan proses dengan mengambilkira hujah berhubung peratusan pegangan syer yang dipegang atas amanah yang telah ditimbulkan juga dalam petisyen ini. Oleh demikian setakat mana petisyen tersebut boleh dikekalkan dan/atau adalah satu penyalahgunaan proses, mahkamah bebas untuk mengambilkira fakta-fakta dan persoalan yang ditimbulkan, dan tiba ke satu keputusan berasingan daripada keputusan penggantungan (lihat perenggan 10).

Notes

For cases on just and equitable rule, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1025–1053.

For cases on stay of proceedings, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1324–1339.

Cases referred to

Ansa Teknik (M) Sdn Bhd v Cygal Sdn Bhd [1989] 2 MLJ 423 (refd)
Charles Forte Investments Ltd v Amanda [1964] 1 Ch 240 (refd)
Loh Eng Leong & Ors v Lo Mu Sen & Sons Sdn Bhd & Ors [2000] 5 MLJ 529 (refd)
Lonrho Plc & Ors v Fayed & Ors (No 5) [1994] 1 All ER 188 (refd)
Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd [1993] 3 MLJ 16 (refd)
Tan Kim Hor & Ors v Tan Heng Chew & Ors [2003] 1 MLJ 492 (refd)
Yai Yen Hon & Ors v Lim Mong Sam @ Lim Ah Tee [1997] 2 MLJ 190 (refd)

Legislation referred to

Companies Act 1965 s 218(1)(i)

MK Yee (Sanil Abrahim and Sharmila with him) (Shearn Delamore & Co) for the petitioners.
Lim Kian Leong (Low Chi Cheng) (Lim Kian Leong & Co) for the respondents.

Zulkefli J:

[1] This is the respondents' application in encl (163) to strike out the winding up petition ('the petition') dated 21 May 2001. The petition herein presented by the petitioners is based on the 'just and equitable' ground under the provision of s 218(1)(i) of the Companies Act 1965. It is clear from the petition that even though

the petitioners are registered as 44.6% shareholding of the ninth respondent company ('the company') the petitioners claimed to be in a '50:50 or equal quasi-partnership' based on a claim that the petitioners beneficially hold 50% of the shares in the company.

[2] This application by the respondents is made on the sole issue that even though in the petition the petitioners claimed on oath to be in a '50:50 or equal quasi-partnership' by virtue of the petitioners allegedly beneficially owning 50% of the shares in the company, yet in another Civil Suit No D2–22–1013 of 2002 ('the said Civil Suit') filed subsequent to the petition, the first petitioner has on oath claimed that the petitioners own 55.4% of the shares in the company and have sought rectification of the shares register accordingly (see exh 'THC-2' of the petitioners' affidavit in support in the petitioners' counter claim in the Civil Suit No D2–22–1013 of 2002). It is the contention of the respondents that the petitioners' sworn claim to be in a '50:50 or equal quasi-partnership' in this petition based on a 50% original shareholding cannot be sustained in view of the petitioners' subsequent claim of owning 55.4% of the shares in the company and that this court has the power to strike out the petition as an abuse of process under its inherent jurisdiction. (see the case of *Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16).

[3] It should be noted at the outset that the records of the company as reflected in all official records at the Companies Commission show approximately 44.6% of shares are held by the petitioners and 55.4% of shares are held by the respondents. However, the petitioners chose not to petition on the basis of this percentage, but on the basis of a '50:50 or equal quasi-partnership' claim. This is a purported claim to an extra 5.4% of the shareholding, over and above that reflected in all official records. It is alleged by the petitioners that this extra 5.4% of the shareholding even though not being evidenced in any records of the company or the Companies Commission, it was being held on 'trust' by the late Tan Sri Tan Yuet Foh and subsequently by the respondents for the petitioners. This claim to an extra 5.4% of shares and the contention of a '50:50 or equal quasi-partnership' has been affirmed by the first petitioner on oath in the first petitioner's affidavit affirmed on 3 July 2001 and 24 July 2001 filed herein (see exh 'THC-3' of the petitioner's affidavit in support).

DECISION OF THE COURT

[4] It is my finding in view of the fact that subsequent to the filing of the petition, the petitioners through the said Civil Suit have made a claim that from the initial incorporation of the company they have actually owned 55.4% of the shares in the company that is, an additional 10.8% more in the share holding, it would be untenable for the petitioners to proceed to pursue this petition on the basis of a claim to an additional 5.4% of the shareholding of the company, and consequently to allege that the relationship between the petitioners and respondents is a '50:50 or equal quasi-parnership' based on the 50% shareholding claim. It would also appear that the petitioners' claim as sworn by them herein to own 50% (or 44.6%) of the shares is entirely inconsistent, incompatible and irreconcilable with the alleged claim to 55.4% of the shares as sworn by the first petitioner in the said Civil Suit. It is clear

that the petitioners' claim in the petition has no foundation in fact, and has not been made in good faith with genuine belief in its merits. The petition filed therefore is an abuse of process and should be struck out (see the case of *Lonrho Plc & Ors v Fayed & Ors (No 5)* [1994] 1 All ER 188).

[5] It is my view the fact that there are two contradictory claims, both asserted by the petitioners, will be determined by two different courts at two different times as shown in the present case would surely go entirely against the established principles of multiplicity, estoppel or issue estoppel (see the case of *Ansa Teknik (M) Sdn Bhd v Cygal Sdn Bhd* [1989] 2 MLJ 423). I am also of the view where there is an alternative course or remedy to a winding up of a company, as in the present case that course or remedy ought to be pursued by the petitioners rather than filing a winding up petition against the company (see the case of *Charles Forte Investments Ltd v. Amanda* [1964] 1 Ch 240).

[6] It must be stated that to date despite being challenged to do so here, the petitioners have not confirmed whether their purported claim to a higher shareholding is for an additional 5.4% as alleged in the petition or 10.8% as alleged in the said Civil Suit claim. However, based on the first petitioner's own statement on oath in the said Civil Suit, it appears that the petitioners claim an additional 10.8%, not merely 5.4%. It is my view the shareholding of the petitioners is a material fact and forms the sub stratum of the petitioners' 'entitlement' to present this petition. With the first petitioner's admission, the petitioners are clearly not in a position to sustain this petition since based on their own claim in the said Civil Suit to own 55.4%, the petitioners would in fact be in the majority. In fact, if the petitioners really own 55.4% of the shares of the company, the petitioners would be 'in control' and there would be no basis for the presentation of a winding up petition since they could simply apply to rectify the register as they have intended to do so in the said Civil Suit and thereafter convene an EGM to correct any alleged wrongs if they win in the said Civil Suit (see the case of *Loh Eng Leong & Ors v Lo Mu Sen & Sons Sdn Bhd & Ors* [2000] 5 MLJ 529).

[7] In this application of the respondents, a poser may be made with so many versions being put forward in respect of the shareholding of the petitioners in the company. We do not know what exactly are the petitioners' contentions and it could be any one of the following:

(a) that they are equal partners in the company based on a 50% shareholding, of which they alleged 5.4% is being held on trust for them as claimed in the petition; or

(b) that they are majority shareholders whereby 10.8% of the shares in the company is being held on trust for them; or

(c) that they are majority shareholders whereby 10.8% of the shares in the company is being held on trust for them; or

[8] The above three contentions cannot in truth or logic co-exist. Only one can be true. It is my view that the petitioners cannot be allowed to file multiple claims and take multiple stands on oath on the very same issue of their shareholding just to suit

the particular purpose of the suit. This court whose equitable jurisdiction is being invoked would not stand by and allow the petitioners to abuse its process in such a manner by swearing the 'truth' of three irreconcilable versions. I find the petitioners in seeking to invoke the 'just and equitable' principle to wind up the company have clearly not come to court with clean hands (see the case of *Yai Yen Hon & Ors v Lim Mong Sam @ Lim Ah Tee* [1997] 2 MLJ 190).

[9] The learned counsel for the petitioners had submitted that the conduct of the respondents in seeking to strike out this petition for the third time is in itself an abuse of process and the application must fail due to res judicata and/or doctrine of estoppel. It is my considered view that there is no res judicata and/or issue estoppel arising in relation to this present application by the respondents. The Court of Appeal's decision in relation to the first striking out application which allowed the appeal by the petitioners (see the judgment of the Court of Appeal as reported in *Tan Kim Hor & Ors v Tan Heng Chew & Ors* [2003] 1 MLJ 492) did not consider the inconsistent and contradictory averments made by the first petitioner in the said Civil Suit, of owning 55.4% of the shares in the ninth respondent, its effect on the petition filed herein based on a claim to ownership of 50% of the shares and the petitioner's inequitable and 'unclean hands' conduct on this issue. The Court of Appeal's decision then was focused on the issue of whether it is a plain and obvious case for striking out or whether the petition is an abuse of process. With respect in my view the said Court of Appeal's decision was therefore premised on different issue and consideration and is not binding herein. Likewise, it is my finding that the Federal Court then did not deal with this new issue when determining the respondent's application whether or not leave ought to be granted against the decision of the Court of Appeal in relation to the first application to strike out.

[10] With regard to the petitioners' reliance on the respondent's second application to strike out the petition which was dismissed by this court on 22 February 2005, I find the second application was premised purely on the non-compliance of the petitioners in failing to file the affidavit verifying petition and this is totally a different issue. As to the court's judgment dated 11 March 2005, it must be clearly stated here that it is the decision of this court to dismiss the respondents' application to stay all proceedings pending inter alia the decision of the court in the said Civil Suit. With respect, in my view the principles for stay of proceedings are different from the principles of striking out. Clearly, the court's decision then was made in relation to and applying the principles of stay. It is my view that even though this court has decided that this petition ought not be stayed as the said Civil Suit will not determine the issue of breakdown etc. as claimed in this petition, this court has yet to consider and may still consider whether the petition is still sustainable and/or whether it is an abuse of process in the light of the contradictory averment of percentage of shareholding held on trust which is raised also in this petition. Therefore, in so far as to whether the petition can be sustained and/or is an abuse of process, this court is at liberty to consider the facts and issues raised, and come to a decision independent of the decision on stay.

[11] For the petitioners, it was also submitted that there is an abuse of process by the respondents in attempting to delay the hearing of this petition. On this point,

it is my finding that the petitioners themselves have filed appeals and applications. As late as 29 October 2004, the petitioners themselves filed an application for leave to appeal to the Federal Court on the decision of the Court of Appeal which disallowed the petitioners' application for re-amendment to this winding up petition. It is therefore abundantly clear that the petitioners themselves are in no position to proceed with the hearing of this winding up proceeding. Therefore, the 'chronology' of proceedings relied on by the petitioners is irrelevant to this application by the respondents to strike out the petition. In this application, we are dealing with the petitioners' conduct of affirming two directly contradictory 'truths' on a matter that goes to the root of the petition wherein such inequitable and 'unclean' conduct taints the petition and as such the petition may be struck out at any time. Equally, the petitioners themselves have delayed and continue to delay this petition by its application and appeals, all of which are matters of record.

[12] For the above stated reasons, I would allow with costs the respondents application in encl (163).

Application allowed.

Reported by Peter Ling